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No. 06-1467

In the Supreme Court of the United States

B. WILLIS, C.P.A., INC.,
Petitioner,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent's Brief in Opposition is replete with misstatements of Petitioner's theory of the case, the prior holdings in other cases and the facts in the case at bar. Respondent is essential using a "straw man" argument of making a false assertion and then knocking down the "straw man" or bogus assertion Respondent falsely attributed to Petitioner.

Specifically, Respondent, Public Service Company of Oklahoma ("PSO") asserts:

1.) There is no conflict between the Circuits or state and federal courts on the issues Petitioner, B. Willis, C.P.A., Inc. ("Willis") presents in the case at bar. (Page 3.)

2.) The Surface Transportation Board ("STB") and D.C. Circuit determined that there was no preemption applicable to the track across the Willis' property. (Pages 3, 16.)

3.) The STB and D.C. Circuit determined that there was no federal jurisdiction over the track across Willis's property. (Pages 6, 16.)

4.) The case at bar is controlled by *Joiner v. City of Dallas*, 380 F. Supp. 754 (N.D. Tex. 1974) *aff'd* 419 U.S. 1042 (1974) and Willis is seeking to have this case overturned. (Pages 10, 11.)

5.) Willis argues that the STB found that it lacked jurisdiction over PSO only and not the track across Willis' property. (Pages 17, 18.)

6.) Under Oklahoma law Willis had two (2) avenues to obtain judicial review of PSO's right to condemn Willis' property but failed to seek an injunction.

ARGUMENT 1

THERE IS A CONFLICT BETWEEN THE CIRCUITS ON THE ISSUE OF A RIGHT TO A PREDEPRIVATION HEARING WHEN PROPERTY IS BEING CONDEMNED.

Respondent asserts on page 3 of its brief in opposition that this case does not seek to resolve a conflict between circuits and then cites cases from the 1st Circuit, *Vazza v. Campbell*, 520 F. 2d 848 (1st Cir. 1975), the 3d Circuit, *Gov't of Virgin Islands v. 19.623 Acres of Land*, 536 F. 2d 566 (3d Cir. 1976) as well as the 10th Circuit, *B. Willis, C.P.A., Inc. v. Pub. Ser. Co. of Okla.*, 182 F.3d 931. 1999 WL 335207 (10th Cir. 1999), cert. denied 528 U.S. 1003 (unpublished), that PSO asserts support the rule that there is no due process right to a predeprivation hearing when property is being condemned. However, as Willis pointed out in its petition, the 8th Circuit in *Hroch v. City of Omaha*, 4 F. 3d 693 (8th Cir. 1993) stated:

> Here the State could and in fact did afford Hroch a predeprivation remedy designed to protect his interest as the owner of the property sought to be condemned...After *Zinermon v Burch* *** we think it clear that the constitutional adequacy of this predeprivation remedy may be challenged under § 1983, regardless of whether a post deprivation remedy is also available. *Hroch* at 695

Thus, according to PSO, there is a conflict between the 8th Circuit and the 1st, 3d and 10th Circuits.

ARGUMENT 2

THERE IS A CONFLICT BETWEEN STATE AND FEDERAL COURTS.

Respondent asserts on page 3 of its brief that this case does not seek to resolve a conflict between state and federal courts. In fact, there is a conflict between state courts and federal courts and the STB on the scope of the federal preemption enacted with the ICC Termination Act of 1995 codified at 49 U.S.C. § 10501 (b).

State courts have interpreted the preemption in the narrowest possible manner, asserting that it was limited to economic regulation only. "...Congress' primary intent was to pre-empt economic regulation of railroads." *Oklahoma Corporation Commission v. Burlington Northern and Santa Fe Railway Company*, 24 P. 3d 368 (Ok Civ App 2001) at ¶ 12 (Emphasis in original.) See also *Union Pacific Railroad Company v. State of Oklahoma*, 990 P. 2d 328 (Ok. Civ. App. 1999).

However, federal courts have taken a much different approach. "In fact, there was nothing in the case law that supported Auburn's argument that, through the ICCTA, Congress intended preemption of only economic regulation of the railroads." *City of Auburn v. U.S. Government*, 154 F. 3d 1025, 1030 (9th Cir. 1998). "The Act reserved no area of regulation for the individual states-agency regulation or otherwise." *BNSF v. Andersen*, 959 F. Supp. 1288, 1295 (Dist. Mont. 1997). In *Fletcher Granite Company, LLC-Petition for Declaratory Order*, STB Finance Docket No. 34020 (served June 29, 2001) the STB noted in footnote 5:

> The argument that the statutory preemption in section 10501 (b) is limited to state and local "economic" regulations was rejected by the court as contrary to the

statutory text and unworkable in practice. City of Auburn, 154 F.3d at 1029-31.

Clearly, there is conflict between state and federal courts on the scope of the federal preemption found at 49 U.S.C. § 10501 (b).

ARGUMENT 3

JOINER V. CITY OF DALLAS DOES NOT CONTROL THIS CASE AND WILLIS DOES NOT ASK THE COURT TO OVERTURN IT.

Respondent asserts that the case at bar is controlled by *Joiner v. City of Dallas*, 380 F. Supp. 754 (N.D. Tex. 1974) *aff'd* 419 U.S. 1042 (1974) and Willis is seeking to have this case overturned. In fact, *Joiner* has little if any relevance to the case at bar.

Joiner concerned a challenge to the constitutionality of Texas eminent domain procedures, alleging a due process right to a predeprivation hearing on necessity and the extent of taking. This claim was denied on the grounds that these were legislative issues.

With respect to the judicial issue of public use, the Court found the Texas scheme constitutional because a predeprivation hearing was available. "Condemnation, however, is for the general public- a criteria easily tested in the District Court **before a loss of possession**..." *Joiner* at 774. (Emphasis added.)

Joiner fails to support Respondent for two (2) reasons. The issue in *Joiner* was whether is was constitutional to require the landowner, in order to obtain a predeprivation hearing on public use, to file a second lawsuit in the state district court after the condemnation action was filed in the

county court. Oklahoma only has state district courts where all proceedings are conducted. Prior to the decision Willis is appealing, to obtain a predeprivation hearing on public use, in Oklahoma the landowner merely had to file exceptions to the report of commissioners challenging the right to take the property. *Public Service Company v. B. Willis, C.P.A., Inc.*, 941 P. 2d 995. (Okla. 1997) at ¶ 17; *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925 (Okla. 1935); *Town of Ames v. Wybrandt*, 220 P. 2d 693 (Okla. 1950).

However, the decision in the case at bar overturns the law that had existed in Oklahoma at least since 1935[1] and Oklahoma law now deems the property subject to the condemnation proceeding to be taken and permits the condemnor to seize possession, as soon as the commissioners' award is paid into court. In the case at bar, this occurred two (2) days before Willis was even notified that Willis now had standing for the first time to file anything with the court. *Board of County Commissioners of Creek County v. Casteel*, 522 P.2d 608 (Okla. 1974). Under Oklahoma law as it now stands, there was and is no procedure for Willis to obtain a predeprivation hearing on public use.[2]

Joiner is also largely irrelevant because the District Court limited its holdings to condemnation by governmental entities, noting that, "We do not have an allegation that the power of

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[1] Compare the decision under appeal found at page 3a of the petition with the 1997 decision in the same case found at 941 P.2d 995.

[2] Respondent persist in asserting that Willis could and should have challenged the right to take its property in an injunction proceeding. However in *Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925 (Okla. 1935) the Oklahoma Supreme Court rejected this concept. None the less, as set out at page 9 of the petition, as soon as Respondent seized Willis' property, Willis sought to enjoin Respondent but the application was denied.

eminent domain has been delegated to a private corporation...." *Joiner* at 744 N. 20. In the case at bar, the condemnor is a private, profit making company that engaged in a massive, criminal conspiracy involving mail fraud and subversion of the judicial process[3] to obtain the property of numerous citizens in Rogers County, Oklahoma so that it could reap millions of dollars annually.

Joiner has little relevance to the case at bar and the issues raised herein would not require that *Joiner* be overturned.

ARGUMENT 4

THE FEDERAL PREEMPTION SET FORTH IN 49 U.S.C. § 10501 (b) PRECLUDES CONDEMNATION UNDER STATE EMINENT DOMAIN LAW OF EITHER RAW LAND FOR A RAILROAD RIGHT OF WAY OR AN EXISTIN G RAILROAD TRACK AND BRIDGE.

Respondent falsely asserts that the STB and the D.C. Circuit found that there was no **federal** jurisdiction over the track across Willis' property, that Willis is claiming that the STB only found that it lacked jurisdiction over PSO and not over the track itself and also falsely asserts that both the STB and the D.C. Circuit found that there was no federal preemption under U.S.C. § 10501 (b) applicable to this occurrence or track.

What the STB and D.C. Circuit held, as Respondent's brief states at page 23, was:

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[3] The lawsuit concerning these matters is presently before the 10th Circuit in Case No. 06-5015. It was fully briefed on June 9, 2006 and argued on November 15, 2006 but no decision has yet issued.

> ...that neither the construction of this private trackage, nor BNSF Railway Company's ("BNSF") operation over the private trackage to serve PSO's generating station, was subject to the **Board's** jurisdiction. (Emphasis added.)

While all STB jurisdiction is federal, not all federal jurisdiction, even concerning railroads, is STB jurisdiction.[4] The federal preemption of the regulation of rail transportation is asserted by Congress, not the STB.

Respondent would have the Court ignore the fact that U.S.C. § 10501 (b) makes two things exclusive. One is the jurisdiction of the STB over rail transportation. The other, which Respondent is ignoring, is (Emphasis added.):

> Except as otherwise provided in this part, the **remedies** provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

The grant of eminent domain authority from the State of Oklahoma to PSO is a remedy. When Willis refused to grant PSO a railroad right of way across Willis' property, PSO exercised its remedy under state law and filed condemnation proceedings.

Likewise, exercising eminent domain for or against railroad rights of way is regulation. *Cherokee Nation v. Southern Kansas Railway Company*, 135 U.S. 641, 10 S. Ct. 965 (1890); *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000).

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[4] Each of the grade crossing on the track at issue has been assigned a federal identification number by the Federal Railroad Administration.

Respondent attempts to rely on *Dakota, Minnesota & Eastern Railroad Corp. v. South Dakota*, 362 F.3d 512 (8th Cir. 2004) but this reliance is misplaced. The 8th Circuit noted (Emphasis added.):

> DM&E applied to the federal Surface Transportation Board for authority under 49 U.S.C. § 10901 to construct new rail lines... DM&E's claim turns on whether the State has used the statute delegating its eminent domain power to regulate and control a **federally approved** railroad project.

Justice Stevens in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) at 2661 stated:

> On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad **with common-carrier duties** is a familiar example. (Emphasis added.)

In *Dakota*, the public necessity for track was determined by the STB and the state court was not adjudicating the public use or necessity of the track. In the case at bar, the public nature of the taking has never been adjudicated by either Congress, as in *Cherokee Nation v. Southern Kansas Railway Company* or the STB as in *Dakota*.

Willis challenged the public use of the taking and PSO, while denying any common-carrier status for the track at issue, asserts the public use requirement is met by the creation of competition between Union Pacific Railroad Company and BNSF to drive down interstate coal hauling rates. BNSF has attested that the existence of the track shifts several millions of dollars in annual revenues between them.

Creating competition between rival interstate common carriers to force rates down is economic regulation of rail transportation. On November 15, 2004 a state judge purports to have determined the public necessity to condemn a railroad bridge and track placed in interstate rail service in March of 1995 to create competition between rival interstate common carriers. These actions violate the federal preemption of remedies found at U.S.C. § 10501 (b) and constitute regulation of rail transportation.

There can be no question that the track at issue is property used in rail transportation. The 11th Circuit in *Florida East Coast Ry. V. City of West Palm Beach,* 266 F. 3d 1324 (11th Cir. 2001) at 1332-1136 gives an in depth review of the history of federal railroad regulation and makes it clear that federal regulation includes property owned by a shipper that is used under an agreement by a railroad company. As soon as the track at issue was constructed, it was turned over to BNSF pursuant to an "Industrial Track and Operating Agreement" under which BNSF has complete control of the track and controls all access to it. PSO may not even go on the track without permission from BNSF's dispatching center in Fort Worth, Texas. 49 U.S.C. §10102(6) (B) defines "railroad" to include "the road used by a rail carrier **or operated under an agreement.**" (Emphasis added.) The fact that the STB disclaims jurisdiction over the track does not mean state and local authorities do have authority to regulate it or that state remedies may be used to regulate it.In, *Cities of Auburn and Kent, Wa-Petition For Declaratory Order-Burlington Northern Railroad Company-Stampede Pass Line,* STB Finance Docket No. 33200 (July 1, 1997), 2 S.T.B. 330[5] the STB stated:

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[5] The decision may also be found at 1997 WL 362017.

> Petitioners complain that our decision in *King County* creates a regulatory void that Congress could not have intended. In such instances, according to the Cities, the states may impose their own oversight authority...As an example, petitioners maintain that states have residual regulatory authority over **spur** or switching tracks **that are excepted from our jurisdiction**...When sections 10906 and 10501(b) (2) are read together, it is clear that Congress intended to remove our authority over the entry and exit of these auxiliary tracks, **while still preempting state jurisdiction over them**...Thus, although **we may not regulate the construction and disposition of spur** and switching tracks, it is equally clear that **state and local authorities may not regulate those activities either..."**
> *Cities of Auburn and Kent, Wa.*, 2 S.T.B. 330 at 341, 342. (Emphasis added.)

See also *Fletcher Granite Company, LLC- Petition for Declaratory Order*, STB Finance Docket No. 34020 (served June 29, 2001) and *Flynn v. Burlington Northern Santa Fe Corporation*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000). In *Flynn* the Court noted at 1189:

> The STB has addressed 49 U.S.C. § 10501 and 49 U.S.C. § 10906 and concluded that Congress intended that neither the STB nor local authorities could regulate the construction and disposition of spur and switching tracks, i.e. auxiliary tracks.

CONCLUSION

There is a conflict between the Circuits and state and federal courts concerning an important national issue. The Court should grant certiorari to resolve these conflicts.

Respectfully Submitted,

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